

Poudyal (Migration) [2021] AATA 2555 (21 May 2021)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Bhupal Man Poudyal
CASE NUMBER:	1802362
DIBP REFERENCE(S):	CLF2013/227287
MEMBER:	Michael Cooke
DATE:	21 May 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 21 May 2021 at 4:21pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – sponsorship withdrawn – decision on the papers – false or misleading information in a material particular – spousal residence arrangements – waiver of requirement – decision under review affirmed

3.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), Schedule 2, cl 801.226; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 17 January 2018 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 12 September 2013. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.801.226 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the applicant did not meet Public Interest Criterion (PIC) 4020.
6. The applicant was scheduled to appear before the Tribunal on 18 February 2021 to give evidence and present arguments.
7. The applicant subsequently informed the Tribunal of the following:
 8. Dear Sir/Madam:
 9. Please be notified that I will not be attending the hearing invitation scheduled on 18 Feb 2021.
 10. Because my wife has written a sponsorship withdrawal first week of January 2021, I find no reason to continue with the invitation.
 11. Please refer to the forms attached as per directive.
 12. Thank you
 13. Kind Regards
 14. Bhupal Man Poudyal
15. As the applicant has relinquished his right to a hearing the Tribunal will now finalize the decision 'on the papers'.
16. The applicant was represented in relation to the review by his registered migration agent.
17. For the following reasons, the Tribunal has concluded that the **decision under review should be affirmed**.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. According to information in the delegate's decision record (submitted by the applicant and found on the Tribunal file) the applicant provided documentation to the Department on 5 August 2015 to assess his Subclass 801 visa application.
19. Included by him and his (then) sponsor were Statutory Declarations dated 3 August 2015 stating that he continued to reside together in a genuine and ongoing relationship at an address in Auburn, New South Wales. He stated that his sponsor's sons were living at a separate address and that he and his (then) sponsor contributed to their school fees, and that he visited them once or twice a week to check their needs. He stated that they both sent money to the Philippines and Nepal when needed and that he was building a home in Nepal for his family, due to the recent earthquake.

20. He stated that he and his (then) sponsoring partner planned to travel to Nepal and the Philippines in December 2016. However, Departmental movement checks indicated that that neither he, nor his (then) sponsor, had departed Australia since the grant of his Subclass 801 visa in March 2014. According to Departmental records, his (then) sponsor's son, Josef Van Ludwig Abadies, travelled overseas in October 2017. Upon his return to Australia on 4 November 2017, he declared that he resided with the applicant's (former) sponsor at an address in Fairfield, New South Wales. Based on this information a telephone interview was conducted with the applicant on 9 November 2017.
21. During the interview, he stated that he and his (then) sponsor were still in a genuine and continuing spousal relationship and that they continued to reside together at his Auburn street address, where he had lived for three years. He stated that he had not travelled overseas as he was under the impression that he would need to apply for a new visa. He stated that his (then) sponsor's children were aware of his relationship and marriage to their mother and that if the Department contacted them, they would support the relationship.
22. Telephone contact was then made with his (then) sponsor's eldest son, Josef Ludwig Abadies, on 9 November 2017. Josef Ludwig Abadies was not aware that his mother was currently sponsoring anyone for a visa. He stated that his mother resided with him at his Fairfield address and that he and his brother had been residing with their mother since they arrived in Australia.
23. The applicant rebutted these adverse findings by way of a Statutory Declarations to both the delegate and Tribunal.
24. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.801.226 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
25. The requirements in PIC 4020(1) and (2) can be waived if there are certain 'compelling or compassionate reasons justifying the granting of the visa': PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given ‘a bogus document’, or information that is ‘false or misleading in material particular’?

26. The term ‘information that is false or misleading in a material particular’ is defined in PIC 4020(5) and the term ‘bogus document’ is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of ‘information that is false or misleading in a material particular’ in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a ‘false or misleading’ statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
27. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
28. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
29. **Findings and reasons about whether there is evidence before the Tribunal that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth ‘information that is false or misleading in a material particular’ as defined in PIC 4020(5):**
30. The applicant was given the opportunity to rebut the findings of the delegate by the Department. He sought to contradict the findings which had been made after the (former) sponsor’s son was interviewed - by telephone. The son indicated he lived with his mother and siblings in Fairfield and was not aware that his mother had sponsored the applicant. The delegate concluded from his investigation that information given in support of the Partner visa application (indicating that the relationship met the definition in s.5F of the Act) was, therefore, suspicious.
31. The claimed spousal parties were then given the opportunity to respond to the investigation findings as part of the Department’s procedural fairness obligation. The applicant and his (then) sponsor sought to disabuse the delegate of the notion garnered from the telephone discussion with the sponsor’s son and arrivals card information - that they were not in a genuine and continuing relationship pursuant to s.5F.
32. The applicant, in response to the contradictory information from the sponsor’s son, confirmed the genuineness of the spouse relationship. He blamed the sponsor’s son’s conflict with his mother for the contradictory information regarding the spousal residence arrangements. His mother (the former sponsor) sent an email to the delegate in which she blamed her son’s ‘personal jealousy’ towards the applicant as the basis for the contradictory information. She also blamed her lack of consultation with her migration agent for not being able ‘to explain thoroughly the living arrangements’ with the applicant.
33. The delegate remained unconvinced by the rebuttal and found a breach of PIC4020.
34. In response to the decision the applicant’s representative later forwarded a submission to the Tribunal in which he strongly reinforced the parties’ claims to be in a genuine and

continuing relationship and sought to explain away the findings of the delegate in his decision. The representative indicated the following:

35. The couple state they are living together at their Auburn residence since February 2012. The Applicant and Sponsor were living together on a full-time basis until October 2013 and since then they have been living together 2-3 days per week. We note that in the Statutory Declaration the form provides the Applicant with two options to select - 'living together' or 'living separately and apart on a permanent basis'. The Applicant stated in his Statutory Declaration that the Applicant and the Sponsor are living together. Based on the information provided to the Department in their Statutory Declaration given the nature of the question, it is unreasonable to assume that the Applicants have provided false or misleading information as the Applicants have disclosed that they are living together, and not living separately and apart on a permanent basis.

36. The couple state that the Sponsor's children are aware of their relationship and the couple's living arrangement. The Sponsor states that she was previously in a relationship with an abusive husband and this has greatly affected her children to the point that they have a personal jealous in terms of protectiveness towards her relationship with the Applicant. We note that the Department contacted the Sponsor's 22 year old son, Josef Ludwig Abadies, on 9 November 2017 and conflicting information was provided when Josef stated that he was not aware of his mother sponsoring anyone for a visa and his mother resided with him at his Fairfield address. The Applicant submits that he does not have a good relationship with the Sponsor's children and accordingly the son provided false information as he did not want to get involved in his mother's relationship.

37. The Tribunal has read the various explanations for the discrepancies in the residential arrangements between the parties and prefers the findings of the delegate. The Tribunal does so because it gives significant weight to the source of the information - being the (former) sponsor's son who resides with her and is acquainted with her daily life. The son indicated that the sponsor was not living with the applicant in Auburn and, in fact, was living with him and his siblings in Fairfield.
38. Subsequently, the Tribunal invited the applicant to attend a hearing. In his response to the Invitation he informed the Tribunal that, not only would he not be attending, but that the sponsor had now withdrawn her sponsorship of him.
39. The Tribunal gives this recent decision by the (former) sponsor significant additional weight as a further indication that the parties, on balance, were not living in a genuine and continuing spouse relationship - as claimed to the delegate and Tribunal. The withdrawal of a sponsorship is a fatal event in the processing of any Partner visa application.
40. The Tribunal has found that 'false and misleading information' was submitted by the applicant in support of his claimed spouse relationship. It is also satisfied that it was not only 'false or misleading' but also in 'a material particular' as defined in PIC 4020(5). This is because it was provided to the Department (and later Tribunal on review) when the applicant was claiming to be in a genuine spouse relationship. Therefore, it is relevant to the assessment of the prerequisite criterion (subclause 801.221(2) of the Regulations). This requires that the applicant be the spouse or *de facto* partner of his sponsor at time of application and decision.
41. Therefore, the Tribunal finds that the applicant **does not meet** PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

42. The requirements of PIC 4020(1) and (2) may be waived where there are 'compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa'. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
43. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
44. For the following reasons, the Tribunal **is not** satisfied that the requirements should be waived.
45. No information has been submitted by the applicant to the delegate or to the Tribunal which indicates he is seeking a waiver of PIC 4020(1) on the basis of any 'compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen' and 'that justify the granting of the visa'.
46. Therefore, the requirements of PIC 4020(1) **should not** be waived.
47. Based on the above, the applicant **does not** satisfy PIC 4020 for the purposes of cl.801.226.
48. The Tribunal finds there is no evidence the applicant meets the criteria for any other subclass within the class of visa sought.

DECISION

49. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Michael Cooke
Senior Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...